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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 282

JOHN L. FLYNN, Trustee of LITHALOYS CORPORATION and LITHALOYS CORPORATION, DEBTOR,
Petitioners,

v.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, For the Second Circuit.

BRIEF IN SUPPORT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the judgment entered by said Court on June 8, 1949 in case No. 21307 on the docket of said Court wherein petitioner-trustee was the appellee.

The judgment relates to the right of the Reconstruction Finance Corporation to priority of payment in a reorganization proceeding pursuant to Chapter X of the Bankruptcy Act by virtue of Section 3a of Public Law 548, 80th Cong. 2nd Sess. U. S. C. Title 15, §603(a).

The judgment was entered (R. p. 32) upon an appeal taken by Respondent from the order of the District Court of the United States for the Southern District of New York.

The Respondent's petition for priority of payment (R. pp. 4-10) was based upon the following contentions:

(a) The Respondent's proofs of claim are entitled to the priority afforded to the United States by Section 3466 of the Revised Statutes U. S. C. Title 31 §191. The District Court rejected such contention (R. pp. 15-17). The Circuit Court of Appeals for the Second Circuit did not pass upon this point (R. p. 30);

(b) The Respondent's proofs of claim are entitled to priority under Section 3a of Public Law 548 of the 80th Cong. 2nd Sess. The District Court rejected this contention (R. pp. 17-20). The Circuit Court of Appeals for the Second Circuit reversed and held Respondent entitled to priority under an interpretation of Public Law 548 (Sec. 3a) giving to it a retroactive effect (R. pp. 30-32).

Jurisdiction.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under §1254(1) Title 28 U. S. C.

The judgment below was entered on June 8, 1949 (R. p. 32).

Matter Involved.

There was no dispute as to the facts presented to the courts below. The issue presented was solely one of statutory construction.

The instant reorganization proceeding was commenced on June 3, 1946 by the filing of the voluntary petition of Lithaloys Corporation (hereinafter referred to as "Debtor") for reorganization under Chapter X of the Bankruptcy Act (R. p. 4).

The Plan of Reorganization was approved and subsequently confirmed by the District Court on February 14, 1947 (R. p. 6). The Plan was predicated upon the debtor's insolvency and provided for a liquidation of its assets and a cash distribution pursuant to the terms of the Plan of Reorganization (R. p. 4).

The Plan, in providing for a cash distribution among creditors, gave recognition to priorities afforded claims as a matter of law (R. p. 6).

The Proofs of Claim Filed by Respondent.

Prior to September 2, 1948, the status of the proofs of claim filed in this proceeding by Respondent was as follows (R. pp. 8-9):

> (a) A claim in the amount of $179,874.96 representing moneys owing by the Debtor arising out of transactions between the Debtor and Defense Plant Corporation (hereinafter referred to as the DPC) under Section 5(d)(2) of the Reconstruction Finance Act.
>
> The aforesaid indebtedness was transferred to Respondent from the DPC under Public Law 109 79th Cong. 1st Sess. upon the dissolution of the DPC.
>
> (b) A claim in the amount of $6,401.16 representing the balance of moneys owing by the Debtor arising out of a loan authorized by the Smaller War Plants Corporation (hereinafter referred to as the SWPC) under Section 4(f) of the Act entitled "An Act to mobilize the productive facilities of small business in the interests of successful prosecution of the

war, and for other purposes approved June 11, 1942 (56 Stat. 354, 356)." (The Manufacturers Trust Company has a 10% participating interest in the loan and accordingly the amount due and owing to Respondent amounts to $5,761.05.)

The aforesaid indebtedness was transferred from the SWPC to Respondent under Executive Order No. 9665 upon the dissolution of the SWPC.

The proofs of claim filed by Respondent totaled $186,276.12. The only claim of priority of payment in said proofs of claim was with respect to an indebtedness in the principal amount of $7,339.13 allegedly representing money had and received by the Debtor in a fiduciary capacity as a result of the settlement of the Debtor's war contract termination claim with the War Department (R. p. 5).

Almost two years after the time for creditors to file their proofs of claim had expired and on September 2, 1948, Respondent filed a claim of priority for all claims theretofore filed by it in the proceeding except with respect to $640.11 representing the aforesaid 10% participating interest of the Manufacturers Trust Company in the loan authorized by the SWPC (R. p. 7).

Respondent based its claim to priority of payment on the basis of Section 3466 of the Revised Statutes, 31 USCA §191, which granted priority of payment to claims of the United States and Section 3a of Public Law 548, 15 USCA §603(a).

Proceedings Below.

The Trustee having rejected Respondent's aforesaid claim of priority (R. p. 8), the latter petitioned the District Court for an order allowing its claims as aforesaid as priority claims in the aggregate amount of $185,636.01 (R. pp. 8-11). The District Court rejected Respondent's

petition for priority on both grounds. The Circuit Court of Appeals did not pass upon the first ground (R. p. 30), but upheld the contention that Public Law 548 (Sec. 3a) granted priority of payment to the claims here involved (R. pp. 30-32).

The Statute Involved.

The statute which petitioners claim the Circuit Court of Appeals has erroneously interpreted is Section 3a of Public Law 548, 15 USCA §603(a), the pertinent part of which reads as follows:

> "Debts due the Corporation [RFC], whether heretofore or hereafter arising, shall not be entitled to the priority available to the United States pursuant to section 3466 of the Revised Statutes (U. S. C., title 31, sec. 191) except that the Corporation shall be entitled to such priority with respect to debts arising from any transaction pursuant to any of the following Acts or provisions in effect at any time: Sections 5d(1) and 5d(2) of the Reconstruction Finance Corporation Act added by section 5 of the Act entitled 'An Act to authorize the purchase by the Reconstruction Finance Corporation of stock of Federal home-loan banks; to amend the Reconstruction Finance Corporation Act, as amended, and for other purposes', approved June 25, 1940 (54 Stat. 573); sections 4(f) and 9 of the Act entitled 'An Act to mobilize the productive facilities of small business in the interests of successful prosecution of the war, and for other purposes', approved June 11, 1942 (56 Stat. 354, 356); section 2(e) of the Emergency Price Control Act of 1942 (56 Stat. 26); the Surplus Property Act of 1944 (58 Stat. 765 and the following); sections 11 and 12 of the Veteran's Emergency Housing Act of 1946 (60 Stat. 214, 215); and section 403 of the Sixth Supplemental National Defense Appropriation Act (56 Stat. 245)."

Question Presented.

The question here presented is: Did Congress in enacting Section 3a of Public Law 548 intend it to be retroactive in effect?

Reason Relied on for Allowance of Writ.

It is submitted that the Circuit Court of Appeals has determined an important question of statutory construction in a manner in conflict with the decisions of this Court. Thus, the Circuit Court of Appeals has construed Section 3a of Public Law 548 to be retroactive in effect contrary to the well established law that such a construction ought not to be given unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied (*United States Fidelity & Guaranty Company* v. *Struthers Wells Co.*, 209 U. S. 306 (1908).

Conclusion.

Under the judgment in review, Section 3a of Public Law 548 is held to be retroactive in effect contrary to principles of statutory construction approved by the decisions of this Court.

The writ should issue.

Respectfully submitted,

JOHN L. FLYNN,
Trustee of Lithaloys Corporation, Debtor,
By CLIFFORD L. PORTER,
Attorney for Petitioner-Trustee.

LITHALOYS CORPORATION, Debtor,
By CHESTER B. McLAUGHLIN,
Attorney for Petitioner-Debtor.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States District Court (R. pp. 15-20) is not officially reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. pp. 28-32) is not officially reported.

Jurisdiction.

As noted in the petition, jurisdiction is invoked under Section 1254(1) Title 28 U. S. C.

Statement of Facts.

The essential facts concerning which there is no dispute are fully set forth in the petition.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred:

In holding that the 80th Congress, in enacting Public Law 548, intended that Section 3a thereof be retroactive in effect and thereby grant the RFC priority of payment in insolvency proceedings pending prior to the date of the enactment.

Argument.

Summary of Argument.

I. Section 3a of Public Law 548 can have no application to the claims here involved.

A. Rules of construction require that Public Law 548 (Sec. 3a) be construed as prospective in its application.

B. The legislative history of Public Law 548 (Sec. 3a) shows that Congress did not construe Section 3466 of the Revised Statute as granting priority to corporate instrumentalities nor intend that Public Law 548 (Sec. 3a) be retroactive in effect.

C. A retroactive construction of Public Law 548 (Sec. 3a) is in direct conflict with well established bankruptcy law.

POINT I.

Public Law 548 can have no application to the instant claims.

A. Rules of Construction Require That Section 3a of Public Law 548 be Construed as Prospective in Its Application.

It is a well recognized rule of construction that all statutes are to be construed prospectively unless the language is expressed to the contrary or there is a necessary implication to that effect. Unless there is a compelling reason why an act should be construed retroactively a substantive right should not be disturbed by subsequent legislation, and this rule has been recognized by the Supreme Court of the United States.

In *United States Fidelity & Guaranty Company* v. *Struthers Wells Co.*, 209 U. S. 306, 314 (1908) the court stated:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied." (p. 314)

So too in *Holt* v. *Henley*, 232 U. S. 637, 639 (1914) the Supreme Court said:

> "We do not need to consider whether or how far in any event the constitutional power of Congress

> would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed * * * but the most obvious, if not the only way, of reaching that result would be by taking the amendment to affect subsequently established rights alone. That is a familiar and natural mode of interpretation, whereas it would be highly artificial to say that it affected existing rights that still might be secured, but not those for which the chance had been lost. * * * The opposite construction would not simply extend a remedy, but would impute to the Act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." (pp. 639-640)

Neither the language nor the legislative history of Section 3a of Public Law No. 548 require that it be construed retroactively. Section 3a as originally passed contained no retroactive statement as to the applicability of Section 3466 of the Revised Statutes (31 U. S. C. 191). The amendment of May 25, 1948 denies such priority as to debts of the Reconstruction Finance Corporation "except that the Corporation shall be entitled to such priority with respect to debts arising from any transactions pursuant to any of the following Acts or provisions in effect at any time: Sections 5d(1) and 5d(2) of the Reconstruction Finance Corporation Act added by Section 5 of the Act entitled 'An Act to authorize the purchase by the Reconstruction Finance Corporation of stock of Federal home-loan banks; to amend the Reconstruction Finance Corporation Act, as amended, and for the other purposes', approved June 25, 1940 (54 Stat. 573); sections 4(f) and 9 of the Act entitled 'An Act to mobilize the productive facilities of small business in the interests of successful prosecution of

the war, and for other purposes', approved June 11, 1942 (56 Stat. 354, 356); * * *"

This language contains words of futurity "shall be entitled" and "arising". Had it been the intention of Congress that this exception should be retroactive in its operation, it would be apparent that instead of the use of such language which carries with its use a prospective application, the words used would have been such that they would have conveyed a sense of retroactivity. It is submitted that the argument that Public Law 548 must necessarily be construed to be retroactive in effect or else be rendered meaningless is specious. Although Congress may have intended that debts arising from certain transactions effected prior to the enactment of Public Law 548 should be entitled to priority in future insolvency proceedings, there is no indication that such priority was intended to be enforceable in proceedings pending prior to the enactment. It is submitted that when Congress intended its enactments to have such a retroactive effect, it has expressly said so. See *City of Chelsea* v. *Dolan*, 24 F. 2d 523 (C. C. A. 1st (1928)) cert. denied 277 U. S. 606.

B. Legislative History of Public Law 548.

The learned Judge in the District Court held that the meaning or effect of an old law is a question for the judiciary and not for the legislature (R. p. 18). There can be no dispute with this holding. Accordingly, to argue from selected statements of Senator Buck, Chairman of the Committee considering amendments to the Reconstruction Finance Corporation Act, that the 80th Congress was of the opinion that Section 3466 of the Revised Statutes granted priority to corporate instrumentalities of the Government and that it was the intendment of the 80th Congress that such priority be continued in certain instances, is immaterial and unsound.

It is submitted that the question, concern or belief of the 80th Congress as to the intent of another Congress in enacting Section 3466 of the Revised Statutes many years previously is not only immaterial but highly speculative and unauthoritative.

Reference to the legislative history of an act should only be required where the language of the act itself makes it imperative to determine the intent of Congress. It is submitted that such a reference is unnecessary in the instant case for the language of Section 3a of Public Law 548 is clear that its application is prospective only. However, reference to portions of the legislative history of this law confirms a prospective construction of it.

In Report No. 1836 of the House of Representatives, 80th Cong., 2d Sess. by the Committee on Banking and Currency, the following statement is made relative to the amendment of Section 3 of the Reconstruction Finance Corporation Act:

> "The provision with respect to the position of the Corporation as a claimant in bankruptcy makes clear that the RFC shall not have the same priority in bankruptcy which is enjoyed by the United States with respect to recovery of funds advanced under the Corporation's regular lending operations, but *would be* entitled to such priority with respect to obligations owed the Corporation as a result of its wartime activities under the specific provisions of the statutes enumerated in this section." (Emphasis supplied)

The words "would be" indicate an intention that the exception should be prospective in its operation.

In the Congressional Record of the 80th Cong., 2d Sess., of Tuesday, April 6, 1948, Volume 49, No. 63, legislative day of Monday, March 29, 1948 of the Senate, Page 4214, appears a discussion by Mr. Buck regarding the

changes made in Section 3 amending Section 3a of the Reconstruction Finance Corporation Act as follows:

> "Because of a recent Supreme Court decision, a question has arisen as to whether RFC may not be entitled to the priority in bankruptcy which is available to the United States. The committee believes that RFC should not have such priority with respect to debts arising from its normal lending activities. A provision has been included in this section which will eliminate that priority except with respect to debts arising under the specific war powers which are designated therein. The committee believes that RFC *should be* entitled to such priority with respect to debts resulting from its wartime activities." (Emphasis supplied)

The words "should be" indicate the intention of the Committee that the priority should be effective after the passage of the Act. It is submitted that the 80th Congress intended that Public Law 548 should be prospective in operation as evidenced by the language of the statute itself and its legislative history.

C. A Retroactive Construction of Public Law 548 is in Direct Conflict with Well Established Bankruptcy Law.

There is no indication that the 80th Congress in enacting Section 3a of Public Law 548 intended to make an exception to the well established law that rights of creditors are determined as of the filing of a petition in bankruptcy proceeding. The general rule is that if a priority, exemption or other preference is to be given any effect it must exist on the date the petition is filed. *White* v. *Stump*, 266 U. S. 310 (1924) (perfection of homestead exemption after filing of petition): *United States* v. *Marxen*, 307 U. S. 200 (1939) (assignment of claim to United States after petition).

Mr. Justice Reed said in the *Marxen* case citing *White* v. *Stump, supra:*

> "We are of the view that §3466 is inapplicable to general claims in bankruptcy transferred to the United States, or to which it has become subrogated on payment, after the filing of the petition, for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves" (p. 207).

In re C. H. Earle, Inc., 2 F. Supp. 15 (E. D. N. Y. 1932), *aff'd on basis of opinion below*, 65 F. 2d 1013 (C. C. A. 2d 1933) *cert. denied*, 290 U. S. 674 (1933), applied the rule of the *White* and *Marxen* cases to a case almost the parallel of this one. There, as here, a statute, passed almost two years after the petition in bankruptcy had been filed, granted priority to a claim. The court refused to give the statute any effect in that bankruptcy proceeding. The court said, 2 F. Supp. at 16, citing *White* v. *Stump*, 266 U. S. 310 (1924):

> "It is fundamental that on the filing of the petition in bankruptcy the assets of the bankrupt's estate constitute a trust fund in *custodia legis*. Let us assume that expedition might have led to a distribution of assets to creditors before April 20, 1931. Certainly in such circumstances the petitioner herein would have had no claim for priority. It surely is an adventitious circumstance that the estate had not been so distributed before the legislation was enacted. Can it be said that such legislation could increase the rights of one creditor at the expense of another without act of either? Clearly the result would be inequitable as effecting not merely remedial but substantive rights." (p. 16)

Cf. In *re Inland Dredging Corporation*, 61 F. 2d 765 (C.C.A. 2d 1932), cert. denied 288 U. S. 611 (1933).

Even where a statute granted the United States priority and specifically declared that the statute was to apply to pending litigation in so far as "practicable" the Circuit Court of Appeals for the Second Circuit has said that it would not apply it to a bankruptcy proceeding already instituted by petition as such an application would disturb "vested" rights. In *re John G. Gasteiger & Company, Inc.*, 25 F. 2d 642 (C.C.A. 2d 1928).

Conclusion.

It is respectfully submitted that Section 3a of Public Law 548 was not intended to be retroactive in effect and accordingly the claim of the Reconstruction Finance Corporation for priority of payment should have been denied.

The writ should issue.

Respectfully submitted,

CLIFFORD L. PORTER,
Attorney for Petitioner-Trustee.

Of Counsel:

LAWRENCE J. MCKAY.

August 19, 1949.